

EIGHTY-SIXTH SESSION

In re Cinquantini

Judgment 1820

The Administrative Tribunal,

Considering the complaint filed by Mr. Bruno Cinquantini against the European Patent Organisation (EPO) on 4 February 1998 and corrected on 4 April, the EPO's reply of 22 June, the complainant's rejoinder of 20 July and the Organisation's surrejoinder of 31 August 1998;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Italian who was born in 1953, joined the European Patent Office, the EPO's secretariat, in 1980 at The Hague. He was transferred to Munich in 1984 and to Vienna in 1992. He went back to Munich on 19 February 1996 as a principal administrator at grade A4.

Article 73 of the Service Regulations entitles an employee to payment of one month's basic salary in installation allowance on transfer from one duty station to another at least 400 kilometres away. An additional month's basic salary is payable by way of installation allowance to someone in receipt of a household allowance who has at least two dependent children provided, among other things, that "the spouse and dependent children have taken up residence at the place of employment".

On 4 March 1996 the complainant claimed the additional installation allowance on the grounds that his wife and three dependent children had taken up residence in Munich at 1 March 1996. On 7 March the Remuneration Department refused his claim on the grounds that his family had stayed on at the same address in Munich while he had been serving in Vienna. He appealed on 14 March 1996. By a letter of 11 November 1997, the impugned decision, the Director of Personnel Development told him that the President of the Office had, on the Appeals Committee's unanimous recommendation, rejected his appeal.

B. The complainant has two pleas.

The first is that the EPO is misreading Article 73 of the Service Regulations: the only condition that the employee's family need meet is that they take up residence at the new place of employment before the date of the claim. Any other condition or restriction would be wrongful.

The complainant's other plea is that what the EPO did was arbitrary and discriminatory. It acted arbitrarily in taking an unofficial and wrong list of children attending the European school to determine that his family were still resident in Munich, whereas they did not live there in 1992 and 1993. It discriminated against him in that the rules require no such enquiry and it did not make one in other cases. He claims payment of the additional allowance.

C. In its reply the EPO acknowledges that the English, French and German versions of Article 73 do not say quite the same thing, but argues for construing it in a way that is in keeping with the case law. The ordinary installation allowance and the additional one for the employee's family are plainly meant to defray the costs of a change of residence. The complainant's family stayed on in Munich while he was in Vienna. There was nothing arbitrary about what the EPO did because it had the duty of checking that he qualified for the additional allowance. It abided, too, by common practice, and he adduces no evidence to suggest that it discriminated against him. The case he makes out is simply not "serious".

D. With his rejoinder the complainant offers evidence to show that one of his sons was at school in Italy in 1992-

93. His wife too, being unable to get a residence permit for Germany while he was in Vienna, was officially resident in Italy. So his family were not continuously resident in Munich. He claims an award of one German mark in token damages for the defendant's saying that his arguments are not serious. He points out that because he had to pay for the upkeep of his family at more than one place from 1992 until 1996 he ran up expenses that he never claimed.

E. In its surrejoinder the Organisation objects to the complainant's taking only the French version of Article 73. The article requires a change of residence both by the staff member and by his family. Only one of the complainant's three children was at school elsewhere than at Munich, and for only one school year at that. Where his wife was "officially resident" is neither here nor there: the place of residence is an issue of fact. Lastly, the defendant denies imputing to him any dishonourable intent.

CONSIDERATIONS

1. The complainant joined the EPO at The Hague in 1980 as an examiner of patents at grade A1. The Organisation transferred him to Munich on 1 September 1984 and to Vienna on 17 January 1992. It sent him back to Munich on 19 February 1996 as principal administrator at grade A4. He is married and has three sons, born in 1979, 1983 and 1984.

While serving in the office in Vienna he lived either in the city or in the outskirts, but he kept on his flat in Munich and with one exception his sons went to the European School there. His wife and second son were living in Blera, in Italy, and the boy attended school there in 1992-93. By 1993 his wife and three sons were together again in Munich, and they lived in his flat there until he himself went back in 1996.

On his return to Munich he was paid the basic installation allowance but he claimed payment of an additional allowance under Article 73(1) and (2) of the Service Regulations on the grounds that his wife and sons had taken up residence there.

On 7 March 1996 the Organisation rejected his claim: the additional allowance was payable only if the staff member's transfer to a new duty station had required the family to change residence whereas his own family had been living in Munich before he had moved back there.

The complainant lodged an internal appeal. The Appeals Board recommended rejecting it on the grounds that, though the French version of Article 73(2) made grant of the additional allowance depend on the mere fact of the family's residence at the new duty station, the English and German required their taking up such residence because of the transfer; those versions were preferable; and so the complainant did not qualify. The President of the Office endorsed that recommendation on 11 November 1997, and that is the decision under challenge.

The complainant asks the Tribunal to quash the decision and claims payment of the additional allowance. In his submission it is the French that best conveys the draftsman's intent and it would be in keeping therewith for him to get the allowance: after all, he had no lesser costs to meet than if he had had to remove his family from Vienna to Munich.

The EPO asks the Tribunal to dismiss the complaint for the reasons it gave in answering the internal appeal.

2. The material rules are in Article 73:

"(1) An installation allowance shall be payable to permanent employees:

a) ...

b) on transfer from one place of employment to another place of employment, these places of employment being situated at least 400 kilometres apart, provided such transfer is of indefinite duration exceeding two months.

This installation allowance shall be equal to one month's basic salary; it shall be supplemented by an additional payment of ... one month's basic salary for permanent employees entitled to a household allowance and having at least two dependent children.

(2) ... the additional payments referred to in paragraph 1 shall be payable only where the spouse and dependent

children have taken up residence at the place of employment ..."

and in the other language versions:

"... les compléments d'indemnités visés au paragraphe 1 ne sont dus que si le conjoint et les enfants à charge résident au lieu d'emploi ..."

"... die Zuschläge zur Beihilfe nach Absatz 1 werden nur dann gezahlt, wenn der Ehegatte und die unterhaltsberechtigten Kinder am Ort der dienstlichen Verwendung Wohnung genommen haben ..."

The conditions for payment of the additional installation allowance do not appear to be the same in French as in English and German in that the French requires the mere fact of residence of the family at the duty station but the English and German their taking up residence there.

Where a rule is cast in more than one official language and no one version is to prevail, all versions shall be deemed to bear the same meaning and the right construction shall be the one that respects the draftsman's intent and best reconciles them: see, in general, Judgments 853 (*in re Benze* No. 6) under 5, and 1032 (*in re Senftl*) under 2; and, for the interpretation of administrative decisions, 537 (*in re Lhoest* No. 2) under 5 and 1450 (*in re Kock* and others) under 15 and 16.

Here there is no real discrepancy. The French text requires the fact of residence but does not say at what date it should have been taken up; the English and German say neither that residence should have been taken up at any particular date nor that residence at the new duty station must continue. The versions are open to an interpretation that reconciles all three.

The interpretation must fit the legal context. The allowance is an additional one payable to the employee in the event of transfer. Unless the contrary can be shown, it stands to reason that, being additional and therefore incidental, it should be due on the same terms as the basic allowance, namely where the employee or family changes residence.

The purpose of it, too, is obviously the same, namely to help the employee meet the costs of removal, which are ordinarily higher when the family is moving as well.

The conclusion is that the additional allowance is payable when, on the employee's transfer, the family takes up residence at the new place of employment and is still living there at the time of the claim.

That condition is not met here since the complainant's wife and children were already resident in Munich before his transfer.

3. His pleas in favour of a more liberal construction of the rule are unconvincing. Arguing for a literal construction, he says that the EPO should not be importing conditions that the text does not set.

Such a construction would not have odd results. A change in place of residence is a condition that would hold good only for the employee, and payment of the additional allowance would turn, not on any change of residence, but on the mere fact of residence at the new duty station, the costs of installation being higher when the whole family moves. But the EPO is right to put on the material text any construction that is lawful. Besides, the requirement of a change in the place of the family's residence does appear in the English and German versions. Lastly, when, on the employee's transfer, the family does not actually move, the employee will incur no further costs warranting the grant of the additional allowance.

Would that allowance be due when the official's family changes homes at the duty station, just as it would be if the family moved to the duty station from somewhere else, however near? The EPO suggests that it would be, but since that is not the case here, there is no need to rule on the issue.

In support of his own interpretation the complainant cites the form to be filled up to claim the additional allowance under Article 73. He points out that the form says nothing of the further conditions the EPO is setting for payment. But the plea fails. The form asks when wife and children took up residence at the new place of employment. Actually he put "01.3.96": the date is wrong, or at least an idle slip.

He pleads equity: in his submission keeping his family on in Munich while he was in Vienna cost him dear; so it would be only fair to let him have at least the additional allowance to offset those costs. But he thereby overlooks the fact that the EPO helps in meeting only the costs of removal: the basic allowance for the employee and the additional one for the family.

The complainant observes that shortly after going back to Munich and making his claim to the additional allowance he took a bigger flat and moved into it and so ran up costs that it would be only fair to refund. Such removal at one and the same place has nothing to do with a change of duty station. An employee who has never changed duty stations at all may move house; and the conditions in Article 73 for payment are not met.

Lastly, the complainant pleads personal prejudice. He says that the EPO paid the additional allowance to others who had changed duty stations without asking whether their family had moved. But he cites no particular instance, and the EPO answers that it has always put the same construction on Article 73. Since improper payment of the additional allowance is not proved, the plea of prejudice and the implied one of discrimination cannot succeed.

4. The EPO has said that the complainant's case is not "serious". The term is not an abuse of the freedom of speech allowed to litigants and casts no aspersion on him. It warrants no penalty.

5. The complaint is utterly devoid of merit.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner